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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KIMBERLY HOPE MULLINS,

Plaintiff and Respondent,

v.

DARREL LEWIS ADAMS et al.,

Defendants and Appellants.

F038845

(Super. Ct. No. 239888)

OPINION

APPEAL from an order of the Superior Court of Kern County. H. A. Staley, Judge.

Early, Maslach & Rudnicki and Priscilla F. Slocum for Defendants and Appellants.

Ralph B. Wegis for Plaintiff and Respondent.

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This is an appeal from an order granting a new trial after the court found prejudicial jury misconduct. We will reverse the order and direct reinstatement of the judgment.

Facts and Procedural History

Plaintiff/respondent Kimberly Hope Mullins was on duty as a California Highway Patrol (CHP) officer on March 22, 1999. She stopped to yield the right-of-way at a freeway entrance. At this point, her police cruiser was struck from the rear by a vehicle driven by defendant/appellant Darrel Lewis Adams and owned by defendant/appellant Ruth Pixler Adams. The evidence concerning the speed of defendants' vehicle at impact was conflicting; evidence indicated a speed as low as two miles per hour and as high as 25 miles per hour.

At the time of impact, plaintiff's head struck an object within her car, leaving a lump but no bruise, and she experienced neck pain and stiffness. Plaintiff received medical treatment, physical therapy, and chiropractic therapy over the course of the next two months. Based on a medical determination that she was 85 to 90 percent healed, she had embarked on a course of fitness training in anticipation of returning to full duty. Plaintiff's physician released her for full work duty sometime before May 30, 1999, and plaintiff did resume her normal job duties. However, plaintiff testified that performing her normal job duties caused extreme pain and migraine headaches.

On May 30, 1999, plaintiff was at a health club using an exercise machine that required use of both arms and legs and elevated the user from the floor. One of the pedals broke, causing plaintiff to drop such that she was hanging by her right hand before she fell to the floor. She injured her hand, arm, shoulder, and, possibly, neck. She received further medical and chiropractic treatment.

Eventually, as a result of a diagnosis of a protruding cervical disk, lifting and motion restrictions were placed on plaintiff. CHP determined plaintiff was permanently disabled, in that she was and would continue to be unable to meet CHP "critical task"

requirements. In particular, plaintiff was deemed incapable of pulling a 200-pound person from a car, one of the necessary tasks.

CHP gave plaintiff three choices: she could be fired, she could receive vocational rehabilitation and transfer to other state employment, or she could take medical retirement based on industrial injury (that is, an injury arising in the course of work). She chose the latter course.

Plaintiff sued defendants for personal injury, lost wages, and loss of future earning capacity. Defendants admitted liability, but denied the accident had injured plaintiff.

At trial, defense counsel wanted to present evidence concerning plaintiff's medical retirement benefits to show plaintiff's motivation for attributing her disability to the auto accident instead of the health club injury. In reliance on the collateral source rule, and with defense acquiescence, the court granted plaintiff's motion in limine to preclude evidence of the amount of retirement benefits. However, plaintiff testified on direct examination that she had elected "medical retirement" in lieu of simple termination of employment.

Plaintiff presented evidence from an economist concerning plaintiff's economic loss. After calculating lost wages, the witness testified as follows: "The next step is to see what kind of residual pension was left over at the time she actually did retire because of her disability and because she hadn't gotten to 10 years of service [with] the Highway Patrol, and [CalPers] pays that out in a lump sum, and that figure I calculated to be $31,008." He calculated plaintiff would have received $431,000 in retirement benefits if she had completed her career with CHP. Therefore, the lump sum payment reduced her loss: "It's, again, a minus sign because of the $431,000 she would have received after retiring. She didn't lose $32,000 of it. She still got that back."

The jury returned a defense verdict. It concluded, by a vote of 11-1, that the auto accident was not "a cause of injury" to plaintiff.

After entry of judgment, plaintiff filed a notice of intent to move for new trial based, as relevant here, on a claim of jury misconduct. Plaintiff submitted declarations from two jurors.

The first declaration, from juror L.C., stated that she recalled two other jurors worked for State Compensation Insurance Fund and the state prison system, respectively. "Although I do not recall specifically who first raised the subject, I recall that both of these individuals confirmed and corroborated … that, as a result of [plaintiff's] medical retirement from the CHP, [she] would be entitled to continue to receive half of her monthly salary as medical leave payments. [¶] … The entire jury was present during the time that the issue of [plaintiff's] retirement benefits was raised, and this issue was generally discussed by the jury as a group."

The second declaration, from juror J.R., identified the same two jurors as employed by State Compensation Insurance Fund and the prison system. The declaration stated: "Based upon their statements made during jury deliberations, both [jurors] appeared to be knowledgeable about the state retirement program that applied to [plaintiff]." J.R. said she made the statement during deliberations that plaintiff "appeared to have been denied her ability to pursue her career with the CHP. In response to my statement, [the other two jurors] both commented that [plaintiff] was still receiving a portion of her salary as retirement benefits from the CHP. I recall that, at some point during the deliberations, it was mentioned that [plaintiff] was receiving at least half of her monthly salary as a retirement benefit. [¶] … [T]his issue was generally discussed more than once by the jury as a group."

Defendants submitted the declarations of two jurors, neither of them the persons alleged to have made the retirement benefits comments. One juror (M.S.) stated that she had no recollection of any discussion concerning retirement benefits. The other juror (K.E.) recalled that the issue was broached only in hypothetical terms, with "no representation that [plaintiff] was either qualified for or was in fact receiving any such

similar benefit. Nor was any quantitative numeric amount referred to." Defendants also submitted the declaration of juror A.R., the State Compensation Insurance Fund employee. She denied making any statements concerning plaintiff's continuing salary through CHP or through workers' compensation. She stated: "Although I recall that someone generally raised a hypothetical comment about some type of benefits structure, neither the nature, type, or quantity of financial benefit was specifically discussed with clarity."

In its written ruling granting the motion for new trial, the court found plaintiff's declarations credible. The court concluded: "Statements that [plaintiff] would be receiving half (or more) of her (CHP) salary constitute communicating information to fellow jurors from sources outside of the trial. As such, they constitute juror misconduct." The court then addressed the issue of prejudice: "It is without question that a presumption of misconduct [*sic*] arises from any juror misconduct. This presumption may be rebutted by proof that no prejudice actually resulted. In this case the burden falls to [defendants] to make such a showing. [¶] … Factors that can be considered in determining if the presumption has been rebutted include (A) the strength of the evidence that the misconduct occurred, (B) the nature and the seriousness of the misconduct and (C) the probability that actual prejudice may have resulted."

Analyzing these three factors, the court first concluded the evidence of misconduct was strong. Next, the court found the misconduct was serious: "The plaintiff sought just over a million dollars based mostly upon lost future wages. The juror misconduct revealed that, not only was the Plaintiff already getting nearly half of what she sought, she had not disclosed this fact in her testimony. The exclusion of insurance payments is a long-held rule designed to avoid prejudice to a claimant who has obtained insurance." As to the probability that actual prejudice may have resulted, the court stated: "The Plaintiff's credibility on the issue of whether she received an injury causing damages in the accident with the Defendants was critical to the case.… In order to find no injury, the

jury would need to reject her testimony on this critical issue. The jury would have to find that she was claiming an injury that did not exist so that she could receive financial gain to which she is not entitled. [¶] This finding against the Plaintiff becomes much more probable if the jury learns that the Plaintiff is already receiving nearly half of what she is seeking and failing to acknowledge the same.… The likelihood that actual prejudice may have resulted as a result of juror misconduct is great."

The court granted the new trial motion; defendants filed a timely notice of appeal.

Discussion

On appeal from an order granting a new trial based on juror misconduct, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) This standard of review applies in appeals from new trial orders in civil as well as criminal cases. (See *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1126 [*Romo*].)

Substantial evidence clearly supports the trial court's credibility determination. We take as an established fact, therefore, that the jury discussed the amount of monthly benefits plaintiff would be receiving as a result of medical retirement.

On the issue of prejudice, however, our independent review convinces us the misconduct of the jury was not prejudicial. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416-417.) There is no reasonable probability of actual harm to the complaining party under the constitutional standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Romo, supra,* 99 Cal.App.4th at p. 1132.)

First, it is simply untrue that plaintiff "failed to acknowledge" the disability retirement benefits. Although the trial court precluded evidence of the amount or nature of such benefits, the evidence disclosed -- and neither party tried to hide -- the fact that plaintiff had been offered, and had accepted, disability retirement from CHP. Pursuant to

the in limine order, however, plaintiff was not asked about monthly benefits and cannot reasonably be viewed as hiding the receipt of such benefits. By the same token, juror statements about the amount of such benefits cannot reasonably be viewed as impeaching plaintiff's credibility in a manner or to a degree different from the impeachment value inherent in the basic fact that plaintiff had a financial motive to attribute her disability to a work-related injury, a fact already revealed by the admissible evidence.

Second, the testimony from plaintiff's economist purported to disclose and account for plaintiff's retirement benefits. Although it appears to us that the economist may have understated the present value of such benefits, there is no question that the total claim for economic damages was reduced by some amount based on plaintiff's receipt of retirement benefits. The juror declarations do not claim the statements about monthly benefits were offered by the offending jurors in an effort to discredit the economist's testimony. Any such consideration would address the issue of damages only: the economist's credibility did not in any manner reflect on the credibility of plaintiff's claim that the auto accident was the cause of her disability.

No juror declaration claims the monthly benefits question was discussed in the context of impeaching plaintiff's credibility. Review of the record discloses other evidence that was -- especially in light of plaintiff's acknowledgement that she accepted disability retirement -- far more damaging than the statements by the offending jurors. The evidence established that plaintiff, through the law firm of her attorneys in the present case, had made a claim against the manufacturer of the gym equipment, stating in a six-page letter that the gym injury was the sole cause of plaintiff's disability.

When asked during cross-examination on June 15, 2001, whether she had ever represented to anyone that the gym injury resulted in her disability, plaintiff repeatedly testified, "I don't recall," "I don't know," and "Not to my recollection." An insurance adjuster for the gym owners testified for the defense that he had received from plaintiff's

lawyer's firm an appointment of attorney signed by plaintiff and the letter described above. This March 8, 2000, letter (redacted) was admitted into evidence.

Any impeachment of credibility from the monthly benefits statements of the offending jurors pales to insignificance when compared to the impeachment accomplished by introduction of the March 8, 2000, letter into evidence.

At trial, plaintiff's only arguments against the damning force of the March 8, 2000, letter were her attorney's statements to the jury that plaintiff herself did not write the letter, the attorney who did write the letter was no longer with his firm, and that he (present counsel) had not reviewed the letter before it was sent. On appeal, plaintiff's only argument is that "it is improper for this Court to independently analyze the entire trial record … to assess whether the jury probably would have reached the same result even if the statement had not been made."

As noted at the outset, the Supreme Court has specifically held that the appellate court is required to evaluate the entire record to determine whether jury misconduct was prejudicial pursuant to *People v. Watson, supra,* 46 Cal.2d at page 836. (See *People v. Nesler, supra,* 16 Cal.4th at p. 582.)

To summarize our conclusions in the present case: after review of the entire record, there is no evidence the jury actually and collectively used the errant statements of the offending jurors to question plaintiff's credibility; there is no basis in the record for the trial court's finding that plaintiff failed to acknowledge the receipt of monthly payments; plaintiff's evidence in fact purported to account for the receipt of "retirement benefits"; and, even indulging in the unsupported speculation that the jury did attempt to make a connection between plaintiff's credibility and the monthly benefits question, impeachment evidence legitimately before the jury provided a far clearer and more compelling reason to disbelieve plaintiff.

Disposition

The order granting a new trial is reversed. The trial court is directed to reinstate the judgment based on the jury verdict. Defendants/appellants are awarded costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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BUCKLEY, J.

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GOMES, J.